AUG 1955
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 298

UNION TRUST COMPANY, ET AL.,
Petitioners

v.

EASTERN AIR LINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OCTOBER TERM, 1955

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UNION TRUST COMPANY, ET AL.,
Petitioners

v.

EASTERN AIR LINES, INC.

Petition For a Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

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The petitioners, Union Trust Company and Melville W. Stuart as executors of the Estates of Ralph F. Miller and Mildred E. Miller, his wife, pray that a writ of certorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in Nos. 11,991 and 11,992 below reversing judgments of the United States District Court for the District of Columbia entered upon a jury verdict in petitioners' favor.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 221 F. 2d 62[1]. The opinion of the District Court in the

[1] The modification of opinion and judgment described hereinafter appears *infra* Appendix A 4a-5a. The opinion of the Court of Appeals is also set out in Appendix A 1a-41a of the Government's petition for a writ of certiorari in the companion case entitled

companion case against the United States is reported at 113 F. Supp. 80 (also I R. 36-46).

JURISDICTION

The judgment of the Court of Appeals was entered February 8, 1955 (U.S. 42a-44a). Petition for rehearing in banc was denied on April 15, 1955 (App. A 2a-3a) and for rehearing by original division on May 4, 1955 (App. A 3a). On petitioners' motion, by order of June 24, 1955, the judgment of February 8, 1955 was amended to limit a retrial to the issue of liability (App. A 4a-5a). Eastern's motion for rehearing on the modification was denied July 12, 1955 (Order, App. A 6a-7a; Per curiam memorandum App. A 5a-6a). By order of July 23, 1955 signed by Justice Black, the time for filing this petition was extended to and including August 9, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In wrongful death actions against an air carrier whose plane collided in mid air with another plane, a verdict was returned in favor of the carrier's passengers. Analyzing the weight of the evidence and inferences therefrom, and particularly the testimony of a control tower operator on the question whether he had cleared the planes to land as against other testimony tending to indicate he did not clear the carrier's plane, the court

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United States of America, Petitioner v. *Union Trust Company, et al.* That appendix and the record filed with the Government's petition will be used for purposes of this petition. Reference to said Appendix A of the Government petition will typically read "U.S. 1a" (i.e., page 1 of that appendix) whereas reference to the appendices to this petition will read "App. A —" or "App. B —". Reference to the Joint Appendix below will read "I R. 1" (i.e., Volume I page 1).

below concluded that the trial judge erred in submitting that question to the jury and in not accepting the version of the control tower operator as a matter of law, and therefore reversed and remanded for new trial on the issue of liability. The questions thus presented are:

1. Whether the extensive appellate excursion into relative credibility and probative weight of evidence under the *guise* of a determination as to the legal sufficiency of the evidence constitued an unwarranted intrusion into the jury's exclusive province and a deprivation of the constitutional right to a jury trial.

2. Whether on disputed evidence, an appellate court can take from the jury the power of determining whether testimony "negative" in form is so in substance and what probative weight is to be given such testimony as against the opposing uncorroborated affirmative testimony of a single witness, and direct the jury as a matter of law to accept the version of that witness notwithstanding that he had been severely impeached and contradicted.

3. Whether, assuming *arguendo* that there was no opposing testimony, a court should instruct the jury as a matter of law to accept the uncontradicted assertion of an interested witness whose credibility has been substantially assailed and whose testimony on most other critical points has been impeached and contradicted.

STATEMENT OF THE CASE

A. In General

As with the companion cases against the United States, these are test cases representative of extensive litigation arising out of a mid-air crash of November 1, 1949 between a military type P-38 and an Eastern Air Lines DC-4, fatal to the 51 passengers and 4 crew of the latter plane.

In wrongful death actions against the operators of both planes and against the United States of America, as owner and operator of Washington National Airport and its control tower (I R. 2-5, 7-10, 12-14), petitioners claimed that Eastern was concurrently responsible for the crash by reason of several acts of negligence by its pilots including, *inter alia,* attempting to land without clearance from the control tower (See pre-trial order, I R. 21-26; see also jury charge at X R. 2107 et seq.). After appropriate instructions (X R. 2091 et seq.) not here in issue, the jury returned a verdict of $50,000 on account of the death of Mr. Miller (I R. 55-56, X R. 2123-2124) and $15,000 on account of the death of Mrs. Miller (I R. 56-57, X R. 2124) after returning answers to special interrogatories with respect to negligence of the private defendants and the situs[2] of the collision (X R. 2123-2124). Motion for new trial was denied (I R. 48A).

On appeal by Eastern, the court below reversed both judgments and remanded for a new trial (U.S. 42a-44a) on the ground that the "negative" testimony of the witness Shaw (the co-pilot of a commercial plane that was approaching to land at Washington National at the time of the crash) that Eastern was not given a clearance to land coupled with claimed corroborating circumstances did not rebut the otherwise uncontradicted statement of the Washington tower controller, Tigner, that he had cleared Eastern to land. The court below held that it was error to have submitted this claimed act of negligence to the jury and remanded for a new trial because it said it could not determine whether the verdict was predicated on this or other of the claimed acts of negligence (U.S. 22a-23a). Subsequently, on petitioners'

[2] The importance of the situs problem, not in issue here, appears in footnote 2 of the opinion below (U.S. 3a; also 221 F. 2d at 64).

motion, the court below amended its opinion and judgment so as to remand for retrial of the issue of liability only (Order of June 24, 1955, App. A 4a-5a), leaving intact the jury's determinations as to situs and damages (see order and opinion of July 12, 1955, App. A 5a-7a, denying Eastern's motion for rehearing on modification).

B. The Pertinent Evidence

1. *In General*

This petition is largely grounded on the necessity of this Court's exercising its supervisory jurisdiction to avoid emasculation of the constitutional right to jury trial under the guise of appellate review as to the legal sufficiency of the evidence where that review usurps the jury's sole prerogative of evaluating questions of credibility and the relative weight and force of conflicting evidence and inferences. In consequence, it unfortunately becomes necessary to refer to the evidence in some detail so as to demonstrate the excesses below. Because of the size of the record, that process would unduly tax this petition and, accordingly, with the Court's indulgence, petitioners refer the Court to the factual recitals and background set out in the opinion below (U.S. 3a-21a; also 221 F. 2d 65-720) which petitioners request the Court to consider as incorporated herein and to be read at this juncture. While petitioners do not subscribe to all the detail and nuances thereof, as will be partially indicated hereinafter, those recitals do furnish an adequate overall picture of the factual situation involved.

Insofar as pertinent here, petitioners' principal difference with the factual assertions in the opinion below relates to the treatment of the testimony of the witnesses Tigner (the key tower controller) and Shaw (the co-pilot of the National Airlines plane), upon which the decision below turned. This testimony will be discussed in the

light of the conclusion, upon which the decision below was based, that Tigner's repeated and unshaken positive assertion that he cleared the Eastern plane to land is unimpaired by the Shaw testimony which, because Shaw was inattentive and not in a position to hear all radio messages for a certainty, is purely "negative" in character.

2. *The Actual Tigner Testimony—Its Lack of Credibility*

The court below *assumed* Tigner's credibility (and that the jury was *required* to believe him) in leading to its finale that " . . . Tigner testified positively that he cleared the DC-4 to land . . . [and] he adhered to that statement despite vigorous cross-examination" (U.S. 16a-17a). In so doing, the court omitted any reference to the plethora of evidence contradicting and impeaching Tigner on almost every single phase of his testimony including his story of the alleged clearance [3]. Again to avoid burdening this petition but to support petitioners' characterization of the Tigner testimony there is attached hereto as Appendix B a comparative chart of the testimony of Tigner and others on various important points in the case. Contrary to the impression given by the opinion below of a reliable and unshaken Tigner testifying he cleared Eastern to land, this comparative chart plainly demonstrates that Tigner was impeached, self-impeached and contradicted on the circumstances of the alleged clearance and on all other aspects of his testi-

[3] There was not one scintilla of evidence corroborating Tigner's story that he cleared Eastern. None of the other men in the control tower could confirm Tigner as to the alleged clearance (VII R. 1562, VIII R. 1575, 1549) although they were not very busy at the time (VII R. 1394, 1409) and, strangely enough, claim to have heard the other alleged transmissions between Tigner and the P-38.

mony to the degree that not one shred of credence could be given anything he said.[4]

3. *The Shaw Testimony—Its Probative Force*

The opinion below similarly miscasts the Shaw testimony, as well as other evidence tending to show that Eastern was not cleared to land.[5] To appreciate the significance of Shaw's testimony, it is necessary to understand the procedures for planes approaching Washington National Airport—which the court below either ignored or did not fully grasp. It is undisputed that as a commercial flight approaches from the north it is on its own company radio frequency (on which it has remained since leaving the last airport). That company frequency (like any other frequency) is in effect a party line and transmissions thereon can only be heard by planes tuned to that party line. When the plane reaches the Beltsville, Maryland area, it switches its radio transmitter and receiver to Washington ATC (Air Traffic Control), a separate and distinct frequency or party line (120.3 megacycles) for planes approaching the Washington airport before they have come under control tower jurisdiction. The plane reports to Washington

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[4] Even the trial judge disbelieved Tigner, as shown by his findings in the companion cases involving the United States, e.g., that Tigner cleared the P-38 to land (I R. 44, 51) which Tigner had vigorously denied. And the jury obviously disbelieved him.

[5] For example, the opinion omits any reference to the unrebutted testimony of a field mechanic, Kirby, that the Eastern DC-4 did not actually follow the landing pattern, but instead cut right across the field and the concourse of the terminal building (II R. 280) which not only reflects on Tigner's credibility and the opinion's assertions that the DC-4 entered the pattern around the field, but which is one of the many separate strands of circumstances upon which the jury could have fairly concluded that Eastern was attempting to land post haste without clearance. The evidence that Eastern was late, so cavalierly disposed of below (U.S. 15a-16a) is of similar import and corroborative of Shaw's testimony that no clearance to Eastern was transmitted by the tower.

ATC (not to be confused with the control tower which is physically a separate entity with separate duties and activities) and ATC then directs the plane to switch over to the control tower, whereupon the plane again rotates its radio selector switch in order to cut in on the separate and distinct radio channel or party line for communication with the control tower (119.1 megacyles). Thereafter, the plane remains on the control tower frequency until it has landed and on that frequency, and only that frequency, receives messages authorizing clearance into the pattern, clearance to land, concerning conditions for landing (weather, wind, runway, etc.), other traffic in the pattern, etc.

Understanding this approach and communications sequence, the Shaw testimony is impressively different from that purportedly summarized in the opinion below. Shaw repeatedly testified: (1) that as his plane approached Beltsville, his pilot (Porter) switched from company to ATC frequency and he (Shaw) *immediately* heard the Eastern plane reporting itself to ATC and being advised to contact the tower (both he and Porter wore head set receivers throughout, see fn. 6 and text *infra*); (2) that the Shaw plane *immediately* went through the same procedure on the ATC frequency; (3) that as the Shaw plane *immediately* switched to the tower frequency, Shaw heard Eastern reporting to the tower and being instructed to enter the left traffic pattern for landing on Runway 3; (4) that *immediately* upon the completion of that transmission, the Shaw plane went through the same procedure with the tower and was similarly cleared into the pattern. That sequence and the fact that the messages and responses were almost instantaneous, one after the other, was repeated several times in the Shaw testimony (See, e.g., I R. 82, 84, 111, 115).

Shaw's testimony continued to show unequivocably: (1) that from the time the Eastern DC-4 and his plane

first switched to the tower frequency, Shaw's plane continued to be tuned to that frequency (I R. 85, 90, 92, 99, 117, 140); (2) that he *never* took his radio earphones off,[6] (3) that during this entire period, the tower frequency (119.1) was very quiet, with only three users, Shaw's plane, the Eastern plane and the tower (I R. 90); (4) that Shaw was very attentive to transmissions over this frequency, shown first by his effort to locate the Eastern DC-4 when he heard it over the radio (I R. 84) and second, by his attempt to locate the P-38 when he heard the tower mention it (I R. 90); (5) that there was nothing to distract Shaw's attentiveness to radio messages (such as log entries to make (I R. 124)); (6) that from the time Eastern and his plane reported to the tower from Beltsville in quick and immediate succession until after the accident, there were no transmissions over the tower frequency by anyone (i.e., Eastern, Shaw's plane or the tower) except two—the first to the effect "Eastern, traffic a P-38. . . ." which he (Shaw) heard when his plane was in the vicinity of the Armory (I R. 90), and the second and last "Look out for the P-38" which he heard about one minute later as his plane approached Haines Point (I R. 99).

Based on its misconstructions of and omissions from the Shaw testimony, the court below reached the wholly unsupported and protagonist-like conclusion that "It is an unquestioned and unquestionable fact that Shaw was not in a position to hear messages from the tower during all the critical nine-minute period" (U.S. 18a). However, as already shown: (a) Shaw was tuned to the tower

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[6] In footnote 5 (U.S. 16a) the opinion unfairly states that Shaw "qualified" his testimony about keeping on his earphones, quoting a portion of his cross-examination. In the context of his entire testimony and absent his voice inflection when he so testified, this is entirely unwarranted. It ignores repeated earlier testimony that he had his earphones on during the entire critical period (I R. 92) and that this was required (I R. 76).

frequency (and remained thereon) almost instantaneously after Eastern tuned to that frequency, whatever time that may have been, so that Shaw could have heard any message between the tower and Eastern, and; (b) from the time Eastern and Shaw's plane were cleared into the pattern, in immediate succession during the very first few seconds both tuned to the tower frequency, Shaw's plane never again called the tower until after the crash (see I R. 90 where Shaw states there were no transmissions on the frequency other than as above stated).[7]

This leads to the last important but erroneous factual assertion below about Shaw: that since Shaw could not have heard Eastern cleared into the pattern, he apparently heard it cleared to land and confused the two (U.S. 19a-20a). That this is sheer fantasy is evident in part from the fact that no such hypothesis was advanced by Eastern. From the earlier discussion of approach and communication procedures and the Shaw testimony, it is clear that Shaw's plane was on the tower frequency almost from the moment Eastern was. (By *almost* we mean that though not at the same precise

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[7] The court below supported its argument largely on the basis of time discrepancies. However, Shaw's assertions of times were only approximate and based on memory (I R. 113, 119). More important, the only factor showing possible error in that regard is the pre-trial stipulation between counsel that Eastern was cleared into the pattern at 11:37 whereas Shaw indicated it was about 11:41-11:43. On the basis of this stipulation, the court says "Shaw did not hear . . . the tower clear Eastern to enter the traffic pattern." (U.S. 19a). This is utterly unsound and beyond the appellate province. First, what basis is there in the record for telling Shaw, a trained, intelligent and honest pilot, what he heard or could have heard where routine commercial aeronautical experience is involved? Second, is Shaw not to be believed because counsel may have blundered in making a pre-trial stipulation prior to a full exploration of the facts? Third, even if Shaw made a mistake as to the exact times (or if clocks or watches did not exactly coincide), it certainly does not follow that he did not hear what he said he heard.

moment, there was still not enough of an interval for a message to get through.) Thus it was impossible for Eastern to have had any earlier communications with the tower because Eastern had previously been on the ATC frequency and before that on its own company frequency. Therefore, that first communication which Shaw heard between the tower and Eastern necessarily was a clearance to enter the pattern *not* a clearance to land which sequentially is not given until the approaching plane is in the immediate vicinity of the field.

Whether or not Shaw was mistaken as to exact times (see fn. 7, *supra*), one thing is certain—that is, when Shaw tuned into the tower frequency *immediately* after Eastern had, he heard Eastern cleared to enter the pattern, whether it was 11:38 or 11:42, *unless* Shaw was lying. And whether he was lying was for the jury—not the court below—to determine.[8]

4. *The Evidence in Summary*

As indicated, the function and limits of this petition and the length of the record will not permit of an exhaustive treatment of the evidence or of its tortured treatment below. However, the foregoing highlighted analysis reflects that as opposed to the Court of Appeals portrayal of an unimpeached and unshaken Tigner story that he cleared Eastern to land with purely "negative" and inconclusive testimony by Shaw that such a message may not have been transmitted, there is on the

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[8] Implying that Shaw's trial testimony on the clearance message was of recent fabrication, the opinion refers to a statement by Shaw during the C.A.B. investigation (more than 3 years earlier) where Shaw was reported as saying he heard Eastern given a landing clearance (U.S. 20a). The court below fails to mention that Shaw testified that this statement was corrected within a few days, saying that ". . . if you will check my [C.A.B.] hearing, I corrected that before Mr. Jones. There was misuse of the words 'landing clearance'" (I R. 118).

record, the fact that the Tigner story came from the mouth of one who was interested, biased and who lied while the Shaw testimony was forceful and convincing that such a clearance had not issued. At the least, where the only question for the Court of Appeals was as to the *legal* sufficiency of the evidence, there was more than ample basis for submission of the question to the jury.

REASONS FOR GRANTING THE WRIT

The Decision Below Is a Shocking Invasion of the Jury's Function, a Gross Impairment of the Right to Trial By Jury and Contrary To Standards For Judicial Review Long Established By This Court.

Wholly apart from its limiting and far-reaching effects on the rights and fortunes of the surviving families of the many killed in this air disaster, the decision below again requires the exercise of this Court's supervisory jurisdiction to prevent the alarming departure from the historical and constitutional dichotomy of functions between judges and juries.

Time was when the time honored and time tested appellate rule for ascertaining the sufficiency of the evidence to support a verdict was based not on the weight of the entire evidence as independently evaluated by the reviewing judges, but rather on the existence of any substantial evidence on which a jury of reasonable men might have decided as they did. In correcting appellate invasions of the jury's province, that rule has been repeatedly emphasized by this Court because

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment, a right so fundamental and sacred to the citizen . . . should be jealously guarded by the courts."

Opening lines of opinion in *Jacob* v. *City of New York*, 315 U. S. 752, 86 L. ed. 1166, 1168 (1942), reversing circuit court of appeals' affirmance of district court's dismissal of negligence action "at the close of the plaintiff's case upon the ground that he had failed to prove facts sufficient to justify submitting to the jury the issue of the defendant's negligence."[9]

The scope of the jury function inviolate from judicial tampering is well described in *Aetna Life Insurance Co.* v. *Ward*, 140 U. S. 76, 88, 35 L. ed. 371, 376 (1890):

> "The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function."

Thus, in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. ed. 525 (1943), this Court, finding "No reason . . . why we should abdicate our duty to protect and guard that right [to jury trial]" where a verdict for plaintiff was upset by the circuit court because of alleged insufficiency of evidence of defendant's negligence, granted certiorari and reversed because:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could

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[9] Quotation from per curiam opinion of Second Circuit in same case. 119 F. 2d 800, 801 (1941).

> have drawn different references or conclusions or because judges feel that other results are more reasonable."

To similar effect see *Gunning* v. *Cooley*, 281 U. S. 90, 74 L. ed. 720 (1930).

In many ways parallel to the issue on this petition is the decision in *Lavender* v. *Kurn*, 327 U. S. 645, 652-653, 90 L. ed. 916, 922-923 (1945) where, in a wrongful death case, the critical question was whether the decedent was murdered or killed by a mail hook protruding and swinging from defendant's train. On certiorari, reversing the Supreme Court of Missouri which had reversed a trial judgment in a jury action, this Court stated:

> "We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustees and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury.
>
> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.
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> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing

what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis supplied.)

For a similar decision on certiorari, also involving circumstantial proof as to how death was occasioned, where this Court granted certiorari and reversed a circuit court judgment setting aside a jury verdict, see *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906 (1914).

Inexplicably ignoring these long standing guides for appellate review, the opinion below wanders through the cold record, selecting at random that which the court chooses to believe or rely upon, thus denying the right—the exclusive right—of the jury to weigh relative probative force and credibility of the various pertinent items of evidence.

Illustrative is the initial error of the opinion wherein the court states that the Eastern plane was struck "from above and behind", whereas under the evidence the jury may have properly concluded, and probably did conclude, that the DC-4 cut in front of and nosed up into the P-38, which conclusion was amply supported by the technical evidence.[10] While that error does not directly bear on

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[10] There was some evidence supporting the court's statement. On the other hand the statement omits the established fact that except for the last seconds (at the most 15 seconds since the DC-4 was on "final" for only ¼ to ½ mile at 120 m.p.h.), the P-38 was on a straight in approach and the DC-4 swung in a wide arc to

the sole issue upon which the decision below turned (i.e., whether Eastern was cleared to land), nevertheless it does reflect an unaccountable and improper appellate disposition to recast the facts on appellate visceral reaction as to whether to accept or reject the truth of bits of testimony. That new disposition must necessarily undermine the jury system. The emphasis would shift from a criterion whether reasonable men could differ to whether the appellate court thinks the jury's verdict was correct in the light of what the particular division[11] of the appellate court thinks the verdict should have been had it sat as a jury of three.

The opinion below suggests a predisposition against the jury system—rumblings of which have been heard in other quarters—for no matter what the sugar coating or the trappings of verbiage, in fact, the appellate court has pre-empted the jury's exclusive prerogative of evaluating credibility of witnesses, weighing the probative force of conflicting testimony and determining which of conflicting inferences is to be controlling.

Beyond ruling that the so-called "negative" testimony of Shaw could not be given any probative value by the jury, the court has in effect ruled as a matter of law that

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cut in front of the P-38 (See e.g., Plaintiffs' Exhibits 1 and 8, XI R. 2125, 2129; cf. trial court's charge at X R. 2113, as to which Eastern has not claimed error). More important, the statement overlooks the testimony of a C.A.B. expert (Pahl) who, from his examination of the wreckage, concluded that at impact there was little difference in the attitudes or the horizontal speeds of the top planes and that the impact could have been caused by the movement of either plane or "by one coming up a little bit and one coming down a little bit" (V R. 1017-1018).

[11] In *Alexandria, Barcroft & Washington Transit Co.* v. *Cox*, No. 12345, decided March 3, 1955, Judge Miller who wrote the opinion below in the instant case again favored upsetting a jury verdict rendered as conflicting evidence, but his view did not prevail because the other two judges who constituted the panel for that case (Bazelon and Washington) voted in a per curiam opinion not to upset.

Tigner told the truth when he testified that he cleared Eastern to land and that the jury was *required* to accept that statement as truth. Yet both judge (see fn. 4 *supra*) and jury obviously disbelieved Tigner in which they were amply justified (See Appendix B).[12]

We have not been able to find a single case comparable to that at bar where the function of resolving credibility and selecting between conflicting evidence and inferences was taken from the jury and its exclusive and traditional province thus invaded by an appellate court. And rightly so, because it behooves judges to resist ". . . the seductive argument [often] made that a conclusion of fact which appears to the court to be reasonable is so clear that reasonable men could reach no other".[13] Indeed were that practice condoned, the tendency would be to reduce the jury to a mere formal appendage.

The same gross departure from constitutional tradition is apparent in the treatment of Shaw's "negative" testimony. The court below notwithstanding, the record shows beyond peradventure of doubt: (1) that Shaw was tuned to the tower frequency all of the critical time that Eastern was; (2) that Eastern could not have been tuned to the tower earlier; (3) that Shaw could not have confused a message clearing Eastern into the pattern with a clearance to land and that the initial message he heard had to be the former; (4) that after this initial message, followed immediately and almost instantaneously by a simi-

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[12] As noted in our original brief below (p. 11), this is not a case of minor inconsistencies in the two versions of the accident, but rather one where the two versions wholly and irreconcilably conflict to such a degree that one must necessarily conclude either Tigner or Bridoux (the P-38 pilot) was a liar. See App. B *infra*. Towards the end of the trial, the judge remarked [at the bench] that "I don't think anybody questioned Bridoux' veracity at all." (X R. 2048).

[13] From opinion of Chief Judge Parker in *Burcham* v. *J. P. Stevens & Co., Inc.*, 209 F. 2d 35 (C.C.A. 4, 1954).

lar clearance into the pattern for Shaw's plane and until after the accident, Shaw's plane was not transmitting so as to create the possibility of blocking incoming transmissions; (5) that Shaw was paying attention to the messages on the frequency, looking for the Eastern plane and the P-38 when they were mentioned on the frequency, and; (6) that the tower frequency was then not busy, being used only by the tower, Eastern and Shaw's plane.

With all this—shown by the record but overlooked, ignored or misunderstood in the court's statement of the facts—Shaw's testimony rises far above the conventional understanding of "negative" testimony. Shaw was an impressive witness with an excellent aeronautical background, civil and military, and of obvious ability and integrity. And though these factors, judged face to face, must necessarily play an important part in determining the weight to be given Shaw's testimony, an appellate court here states that as a matter of law he must have been mistaken. We submit that a careful re-reading of his testimony in the light of each assertion in the opinion below must convince this Court of the injustice resulting from the misinterpretation of the Court of Appeals.

As a matter of fact, Shaw actually testified affirmatively that Eastern was not cleared (I R. 92)—a record fact which the court also overlooked in its opinion. He obviously and sensibly based this categorical statement on the fact that if any clearance to land had issued to Eastern, he was in a position to and would have heard it and remembered it.[14] This testimony was affirmative, positive

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[14] Again, the court incorrectly questions Shaw's attentiveness when it asserts (U.S. 20a-21a) that he testified with respect to the tower message "Eastern, traffic, a P-38 . . ." that the direction did not "register". Shaw testified that when he used the word "register" he meant that whatever the direction given was he had no recollection of it [3 years later] at the trial (I R. 91-92).

and not objected to; it was sufficient without more to create an issue against Tigner's sole uncorroborated testimony that he did clear Eastern. Obviously, as an intelligent pilot at the controls and wearing earphones coming into a busy airport, Shaw was very much concerned with messages being broadcast on his radio frequency concerning landings. His being at the controls of the plane hardly detracts from his concern, interest and care to note all broadcasts that might affect his handling of the controls. He would be particularly concerned with a clearance broadcast to the Eastern plane, which he already knew had been cleared into the pattern immediately before he was so cleared, the movements of which would vitally affect and determine his own actions. He made this evident by his testimony that when he heard Eastern reporting and cleared into the pattern, he immediately looked around to locate it (I R. 84).

Conceding, *arguendo*, the hypothesis below that negative testimony is not entitled to the same probative weight as positive affirmative testimony (the springboard for the ultimate conclusion that Shaw's testimony did not rebut Tigner's on the clearance issue), there remains no excuse for the action below. Its logic, or rather illogic, are the false companion assumptions: (1) that testimony is either black or white, positive or negative, and (2) that whether testimony is truly negative, i.e. whether the witness was attentive and in a position to see or hear, is for judges to determine rather than for the jury. Here is the gist of the appellate court's invasion of the jury function. Whether Shaw's testimony was negative in form, it was the sole function of the jury to determine whether that testimony was substantively negative and the weight to be given it. In this case, the jury reasonably could (and undoubtedly did) conclude that the probative weight of the Shaw testimony was substantial because he was, in fact, in a position to hear and was attentive. Since, at the least, reasonable men could have differed on this, ju-

dicial authority does not extend to dictating to the jury what their conclusion should be as to whether a witness was attentive and in a position to have observed. The sole judicial intervention, if any, in the making of such a determination should properly be limited to trial court instructions, if requested (which Eastern did not), calling the jury's attention to the qualitative difference between positive and negative testimony to be considered by the jury in arriving at the probative weight assigned each.

In summary, the opinion below parallels a jury argument, culling the testimony and inferences, and selecting those which impress the proponent—a far cry from the appellate function. Indeed, the departure becomes more evident in the attempted disposition of those circumstances, which petitioner urged corroborated Shaw's no clearance testimony. Apart from the error in the analysis or omissions of pertinent evidence in this regard (see fn. 5 *supra*), petitioners question the opinion's technique in isolating each of these corroborative circumstances and then concluding as to each thus separately considered that it is without substantial weight as evidence of lack of clearance. One can never see a forest by confining the sight to a single tree or a series of single trees. Apart from the direct denial of clearance as discussed above, we have not argued and do not argue that any one of the circumstances considered separately in a vacuum would be sufficient to prove Eastern was not cleared. We do urge that their combined effect coupled with the forceful and substantial Shaw testimony unquestionably raised a substantial issue for the exclusive fact finder—the jury—as to whether an impeached and contradicted Tigner was to be believed in his uncorroborated word that he had cleared Eastern to land.

With respect to Eastern being late, we never suggested it was any more than circumstantial evidence to be considered by the jury with other evidence on the clearance issue, just as in automobile negligence cases it has al-

ways been considered relevant and probative that the person charged with speeding was late for an appointment. Thus Eastern's lateness was a circumstance which, though not of itself proof of lack of clearance, was one of the "separate strands of circumstances" which when added to others gathered probative force.

Of similar probative value and effect—though, as noted, completely overlooked by the court below—was the Kirby testimony (see fn. 5 *supra*) and the fact that *not one of the other seven controllers in the tower* (including the three—Union, Davis and Rydstrom—who testified) *corroborated Tigner's alleged clearance to land.* Yet those who testified did allegedly hear and testified in minute detail with respect to all of the other of Tigner's alleged communications during the critical period.

II.

The Court of Appeals Erroneously Concluded That the Jury Must Accept the Uncontradicted Testimony of A Witness Whose Credibility Had Been Substantially Assailed; That Decision Conflicts With Decisions of This Court and Several Circuits.

After having improperly discarded all opposing testimony, the court below held that the jury was bound to accept Tigner's word, that a jury is required to believe the uncontradicted assertion of an interested witness whose credibility has been substantially assailed. However, opinions of this Court, and the Circuits and state courts demonstrate that where, as here, a witness has an obvious interest in the outcome of the case and his general credibility has been seriously and substantially opened to question because of impeachment, contradiction and self contradiction on other material facets of his testimony—then *any* and *all* of his testimony, whether or not directly contradicted, is necessarily to be passed upon by the jury.

The settled rule that the credibility of witnesses is for the jury applies even to uncontradicted testimony. Thus, in *Quock Ting* v. *United States*, 140 U. S. 417, 35 L. ed. 501 (1891), a deportation case, where the trial court disbelieved the uncontradicted testimony of the petitioner and his father who swore that the petitioner was born in the United States, this Court said:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, *although there be no adverse verbal testimony adduced.* (Emphasis added.)[15]

Similarly in *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U. S. 401, 408 (1898), where, in an attach-

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[15] Citing *Elwood* v. *Western Union*, 45 N. Y. 549 (1871) where, as to the uncontradicted testimony of an employee of a party, the court said:

> "The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility . . . . And furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. In such cases, courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached . . . . Without imputing a want of truthfulness to these witnesses, we think that their relation to the subject

ment suit, there was uncontradicted testimony by the assignees of a prior effective assignment of the goods sought to be attached, the trial court's submission of this issue to the jury was upheld by the Court which stated:

> ". . . while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, the very courts that lay down this rule qualify it by saying *the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.*" (Emphasis added.)

Reaffirmed in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 88 L. ed. 967 (1944). See also *The Indien*, 71 F. 2d 752 (C.C.A. 9, 1934); *Ammons* v. *King*, 133 F. 2d 270, 272 (C.C.A. 8, 1943); *Rosenberg* v. *Baum*, 153 F. 2d 10, 13, 14 (C.C.A. 10, 1946); *Quon* v. *Niagra Fire Ins. Co.*, 190 F. 2d 257, 259 (C.C.A. 9, 1951).

Judge Jerome Frank, whose public writings and opinions certainly do not reflect any strong attachment to the jury system in civil cases, said of the so-called uncontradicted testimony rule (in an opinion in which Judges Hand joined):

> "Whether the so-called 'uncontradicted testimony' rule (the rule that such testimony is binding) has been adopted by the Supreme Court we are not at all sure. Sponsors of that rule point to *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 75 L. ed. 983. But there the Court was at pains to explain that the testimony of the witness . . . was 'so completely corroborated by the undisputed facts . . . as to put it beyond the reach of a fair doubt.' The rule, absent such qualifications, has been rejected in

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matter in controversy was of itself sufficient to take from the court the right to dispose of the case upon their [defendant's employee's] evidence and to require that the jury should pass upon evidence and to require that the jury should pass upon the weight to be given to their statement."

several states, and has little to commend it rationally. For the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' . . . The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court' . . . 'The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him. The alleged 'rule', if taken literally, would return us to the practice of 'trial by deposition', which common-law procedure rejected and which, in recent years, has been rejected in federal non-common law trials as well."

". . . Demeanor, to be sure, is no infallible guide, to reliability of testimony; yet, as matters now stand, it is one of the best guides available."

". . . assume, arguendo, that the rule prevails in the federal courts . . . among the exceptions to the rule is this: It is inapposite if the witness has an 'interest'." [16]

The peculiar and exclusive advantage of the trier of fact to observe and consider the demeanor of the witness in weighing the probative value of his testimony was also recognized in *Elzig* v. *Gudwangen*, 91 F. 2d 434, 440 (C.C.A. 8, 1937) holding that the defendant's uncontradicted testimony as to the position of the wheel of his truck with relation to the shoulder of the road should go to the jury in a negligence action.

See also *People* v. *Tuczkewitz*, 149 N. Y. 240, 43 N. E. 548 (1896) stating:

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[16] *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 175 F. 2d. 77, 79-81 (C.C.A. 2, 1949).

"A witness may be discredited even when not contradicted . . . . His manner upon the witness stand, his halting and quibbling in answering questions, may satisfy both the court and the jury that he is swearing falsely and yet no witness may be in existence that could contradict his testimony. He may have told a probable story, and yet it may have been false and rendered incredible by reason of his character and manner."

To the same effect is *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86. (C.C.A. 9, 1953) stating:

"[Respondent] says: 'It is well settled law that where a witness' testimony is not contradicted, a trier has no right to refuse to accept it.' This is an ancient fallacy which somehow persists despite the courts' numerous rulings to the contrary. It overlooks the significance of the carriage, behavior, bearing, manner and appearance of a witness,—his demeanor,—when his testimony is given orally in the presence of the trier of facts."

In *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (C.C.A. 2, 1952) this thought was expressed by Judge Learned Hand as follows:

"The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is,

there is no alternative but to assume the truth of what he denies."

If ever there were a case where record and non record factors potentially bore on the credibility of testimony, this is that case. Tigners' interest and defense alignment were obvious. His job and air controller certificate may well have depended on his giving an acceptable account of his part in the accident. If he were to retain his job, he had to continue to work with the regular commercial airlines (including Eastern) using the field. If Bridoux had died—which, shortly after the accident when Tigner's story was framed, was undoubtedly anticipated—the easiest way out for Tigner was to put the whole blame on Bridoux and exculpate Eastern. And even if Bridoux survived, Tigner undoubtedly thought his word would be accepted over that of a foreign pilot. Moreover, as an employee of the other defendant, the United States, Tigner was required to explain why he did not divert the Eastern plane earlier if he had not cleared it to land. Finally, when the C.A.B. investigation began, Tigner may well have erroneously stated that he cleared Eastern to land and thereafter feared to change that statement because of his concern whether he would then be believed in anything and whether he would lose his job.

But beyond the matter of his evident interest, Tigner's demeanor and manner of testifying was of vital importance. Can any reviewing court say that the jury could not have considered his total inability to explain all of the details surrounding the alleged clearance message and his numerous self-contradictory statements as to where the Eastern plane then was? From the cold record can any reviewing court describe Tigner's gestures or facial expressions when he stated he cleared Eastern? Can it know whether he fidgeted or can it describe his intonation?

Disregarding those decisions of this Court and lesser courts noting that adherence to the jury system requires that even uncontradicted testimony pass jury scrutiny where serious questions of credibility have been raised, the court below has further departed from its function and invaded those of the jury.

CONCLUSION

The decision below is grounded upon an apparent indifference to the jury's exclusive function and right to judge credibility of witnesses and to weigh the probative force of conflicting evidence and inferences. It represents a gross and alarming departure from our constitutional jury tradition which should be checked here before it gets out of bounds. If the many families affected are to be protected, if more than lip service to the jury system is to be compelled, if appellate review of the *legal* sufficiency of evidence to support a jury verdict is to be kept in historically proper channels and if the fate of litigants is not to be determined by a retrial before an appellate jury of three—then the action of the Court of Appeals must be reviewed and reversed here. Accordingly, in the exercise of its supervisory jurisdiction, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

For Opinion and Judgment of United States Circuit Court of Appeals for the District of Columbia Circuit see Appendix A, 1a-41a and 42a-44a of Government Petition For a Writ of Certiorari entitled *United States of America, Petitioner* v. *Union Trust Company, et al.*

Filed Feb 28 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

January Term, 1955

No. 11,991

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' motion for enlargement of time to March 25, 1955 to file a petition for rehearing in banc or by the division which heard the cases, to file a motion to clarify or modify judgments in the event rehearing is denied, and to stay the mandate of this Court, it is

ORDERED by the Court that the time within which a petition for rehearing in banc, or a petition for rehearing, and the time for filing a motion to clarify or modify the judgment be, and it is hereby, extended to March 24, 1955.

It is FURTHER ORDERED by the Court that the issuance of the mandate of this Court be, and it is hereby, stayed to and including March 24, 1955.

Per Curiam.

Dated: February 28 1955

Filed Apr 15 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' petition for a rehearing in banc or by the original division in the above entitled cases, it is

ORDERED by the Court that insofar as petition is made for a rehearing in banc, the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: April 15 1955

Chief Judge Stephens and Circuit Judge Bazelon did not participate in the foregoing order.

Filed May 4 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991

Eastern Air Lines, Incorporated, Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Acting Chief Judge, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' petition for rehearing by the division which heard the above-entitled cases, it is

ORDERED by the Court that said petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated: May 4 1955

Filed Jun 24 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

No. 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellees' motion for leave to file a motion to clarify or modify judgments in the above entitled cases, and it appearing that said motion to clarify or modify judgments has been lodged with the Clerk, it is

ORDERED by the Court that the Clerk be, and he is hereby, directed to file forthwith appellees' motion to clarify or modify judgments; and upon consideration of appellees' motion to clarify or modify judgments, and of appellant's reply and opposition thereto, it is

ORDERED by the Court that the opinion of this Court entered herein February 8, 1955 be, and it is hereby, amended by adding on Page 36 after the words "are remanded for a new trial" the following words, "restricted

to the issue of liability", so that the sentence as amended will read:

"The judgments in Nos. 11,991 and 11,992 are reversed and the cases are remanded for a new trial restricted to the issue of liability".

It is FURTHER ORDERED by the Court that the judgment entered herein February 8, 1955 be, and it is hereby, amended by adding in Paragraph 4, in the fifth line, after the word "trial", but before the semicolon, the words, "restricted to the issue of liability", so that said line as amended will read:

"to the said District Court with directions to award a new trial restricted to the issue of liability; and"

Per Curiam.

Dated: June 24 1955

Filed Jul 12 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Nos. 11,991 and 11,992

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Memorandum on Motion filed July 1, 1955, for Rehearing on Appellees' Motion to Clarify or to Modify Judgments.

Before Edgerton, Wilbur K. Miller and Fahy, Circuit Judges.

PER CURIAM: Pursuant to appellees' motion to clarify or to modify the judgments of reversal heretofore entered in these cases, we entered an order June 24, 1955, restricting the retrial in the United States District Court to the issue of liability.

The appellant has moved that we reconsider that order and amend it to permit the retrial of the issue as to the situs of the collision, as well as the issue of liability. The appellant argues that in our opinion of February 4, 1955, we expressly refrained from either reviewing or deciding the situs point. Eastern misconstrues our opinion in that regard. We simply said we thought it unnecessary to discuss the issue concerning the situs of the collision and the other grounds for reversal advanced by Eastern. We had considered Eastern's contention that the planes collided in Virginia, instead of in the District of Columbia as found by the jury, and had determined the jury's finding was sufficiently sustained by the evidence. We adhere to that view. Consequently the appellant's motion for rehearing concerning our order of June 24, 1955, is denied.

Dated: July 12 1955

Filed Jul 12 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

April Term, 1955

No. 11,991-2

Eastern Air Lines, Inc., Appellant,

v.

Union Trust Company, et al., Appellees

Before: Edgerton, Chief Judge, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's motion for rehearing on appellees' motion to clarify and to modify judgments in the above-entitled case, it is

ORDERED by the Court that the aforesaid motion for rehearing on appellees' motion to clarify and modify judgments be, and it is hereby, denied for the reasons set forth in the memorandum of this Court filed herein this day.

Per Curiam.

Dated: July 12 1955